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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 954

ERWIN H. EZZES,
Petitioner,

—against—

SOL A. DANN, et al. and MARY L. GALLO, et al.,
Respondents, Plaintiffs below,

and

CHRYSLER CORPORATION, et al.
and PAUL C. ACKERMAN, et al.,
Respondents, Defendants below,

and

HERMAN KOENIGSBERG and VIRGINIA S. JUDSON, et al.,
Respondents, Objectors below,

and

ARTHUR HOFFMAN,
Petitioner (No. 893, Oct. Term 1964),
Objector below.

REPLY BRIEF OF PETITIONER ERWIN H. EZZES IN SUPPORT OF PETITION FOR CERTIORARI

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INDEX

PAGE

Statement 2

1. The opinion of the Supreme Court of Delaware was not a final judgment 2

2. The opinion of the Delaware Supreme Court shows that petitioner Ezzes raised the question of the violation of the proxy solicitation provisions of the Securities Act in the Chancery Court and the Supreme Court of Delaware .. 4

3. Regardless of any provisions of State Corporate Law, the Delaware Supreme Court was obligated to determine the matter by the application of Federal Law 8

4. Respondents concede in effect that petitioner is asking this court to hear a substantial federal question of nationwide importance 10

Conclusion 12

CITATIONS

Bryant v. *Zimmerman*, 278 US 63 (1928) 8

CIR v. *Estate of Bedford*, 325 US 283 (1945) ... 2

JI Case v. *Borak*, 377 US 426 (1964) 10

Kerbs v. *California Eastern Airways*, 33 Del. Ch. 69, 90 A. 2d 652 (1952) 6, 7

Lawrence v. *State Tax*, 286 US 276 (1932) 10

PAGE

Puget Sound Power Co. v. *King County*, 264 US 22 (1924) 2

Williams v. *Kaiser*, 323 US 471 (1945) 10

REGULATIONS

Regulations of the Securities and Exchange Commission, Rule 14a-9 .....5, 12

STATUTES

Rules of Supreme Court of Delaware, Rule 14 .. 3

Securities and Exchange Commission Act:

Section 14 .....9, 11

Section 14(a) 7

Section 27 7

28 USC Sec. 1257 (3) 2

28 USC Sec. 2101 (c) 2

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Statement

Respondents have filed three separate briefs. The brief of "certain defendants" will be referred to as the "CD brief." The brief of respondents Gallo et al, will be referred to as the "Gallo brief." The brief of respondents Horvath et al, will be referred to as the "Horvath brief."

—

1

The opinion of the Supreme Court of Delaware was not a final judgment

Respondents argue that petitioner's writ of certiorari was not timely filed, because it was not filed within 90 days after the Supreme Court of Delaware filed its opinion. They argue that the opinion of the Delaware State Court is a final judgment within the meaning of 28 USC Secs. 1257 (3) and 2102 (c).

The argument of the respondents is contrary to the determinations of this court as well as the local practice of the State of Delaware.

In *CIR* v. *Estate of Bedford,* 325 US 283 (1945), and *Puget Sound Power Co.* v. *King County,* 264 US 22 (1924), this court was confronted by an argument similar to that made by the respondents. In both cases this court rejected the argument and held that the "Mandate" of the court, and not the "opinion" of the court, constitutes the final judgment which starts the running of the 90 day period within which a petition for certiorari must be filed.

On page 26 the CD brief, said respondents have set forth Rule 14 of the Supreme Court of Delaware. The plain language of this Rule shows that, according to the local Delaware practice, it is the mandate, and not the opinion, which constitutes the final judgment. Said Rule 14 provides that in each cause finally determined in the Delaware Supreme Court, "a mandate . . . shall be issued to the court below and shall be accompanied by a copy of the opinion of this Court." It then goes on to provide that no such mandate shall issue until after a petition for reargument has been denied, or until after the time allowed for filing a petition for reargument has expired. The purpose of this provision is to ensure that no mandate will issue until the time has passed within which the court could change any determination upon reargument, thereby insuring that the mandate will be a final judgment.

Rule 14 also provides that the mandate shall be accompanied by a copy of the opinion of the Court. If the opinion of the court were the final judgment, there would be no need either to issue the mandate or to provide that the opinion of the court must be annexed to the mandate.

A reading of the express language of the Mandate, found on pages 21-22 of the Appendix to the Ezzes Petition, shows that the mandate is the only paper issued by the Supreme Court of Delaware in the traditional form of a judgment. It is the only paper wherein "it is ordered and adjudged," and wherein provision is made for costs. The mandate is the only paper issued by the Supreme Court which is intended to be, and which by local Delaware practice is, the final judgment of the Delaware Supreme Court.

The Mandate of the Delaware Supreme Court was entered on December 7, 1964. The Ezzes certiorari petition was filed in this court on March 4, 1965. This is less than ninety days after the entry of the aforesaid final judgment. The petition was timely.

2

The opinion of the Delaware Supreme Court shows that petitioner Ezzes raised the question of the violation of the proxy solicitation provisions of the Securities Act in the Chancery Court and Supreme Court of Delaware.

Respondents argue that the Ezzes petition does not show, by reference to the record, that the federal question which he seeks to bring before this court, was raised in the State Court.

In this case there is no need to refer to the record in order to show that Ezzes raised the question of the violation of the proxy solicitation provisions of the Securities Act before the state courts of Delaware. The portion of the opinion of the Delaware Supreme Court which is set forth on pages 22 to 24 of the Ezzes petition, shows that Ezzes argued in both the Chancery and Supreme Courts of Delaware, that the 1963 Plan was invalidly approved by the stockholders of Chrysler because the directors did not include vital information in the proxy material. In its opinion, the Delaware Supreme Court expressly points out that Ezzes argued "... that approval of the 1963 Incentive Compensation Plan by the directors and stockholders was invalidly obtained," and "that there was no effec-

tive stockholder action because a fair disclosure of the facts was not made to the stockholders," and that the failure to include "in the proxy material" the information that the 1963 Plan would produce a substantially greater fund for 1963 than would the 1956 Plan, "constituted a breach by the directors of their duty to make a full and frank disclosure to stockholders." The opinion concludes by stating that the chancellor imposed as a condition to his approving the settlement, the requirement that no director-defendant shall receive greater benefits under the Plan in 1963 than he would have received under the 1956 Plan, and that "this condition adequately takes care of Ezzes' objection."

The respondents admit that Ezzes did raise the question before the Delaware Supreme Court and quoted Rule 14a-9 of the Regulations of the Securities and Exchange Commission in his reply brief. On page 9 of the Horvath brief, said respondents have quoted from page 5 of the Ezzes reply brief in the Delaware Supreme Court. This clearly shows that Ezzes raised the question in that court.

In fact, Ezzes' main point upon appeal to the Delaware Supreme Court was predicated upon his contention that the 1963 Plan was invalid, apart from any consideration of the fairness of the settlement, because of the improper proxy solicitation resulting from the failure of the directors to include in the proxy material the information which they had to the effect that the 1963 Plan would produce a substantially greater fund than the 1956 Plan. This was Ezzes' Point I in his main brief to the Delaware Supreme Court. It was his Point I in his reply brief to the Delaware Supreme

Court. It was the main thrust of his oral argument to the Delaware Supreme Court when the case was argued. The argument was also contained in Point VII of his main brief to the Chancery Court (Docket Entry No. 238), and Points I and VIII of his reply brief to the Chancery Court (Docket Entry No. 249).

On pages 11 to 12 of the Gallo brief, said respondents argue that Ezzes was prohibited from raising the question on appeal to the Delaware Supreme Court, because it had not been fairly presented to the Chancery Court for determination. As shown by Ezzes on pages 2 to 3 of his reply brief to the Delaware Supreme Court, this same argument, obliquely made by the defendants in a footnote to their brief to the Delaware Supreme Court, was contrary to both the facts and law of the state of Delaware. *Kerbs* v. *California Eastern Airways*, 33 Del. Ch. 69, 90 A 2d 652 (1952). As was said in *Kerbs*, at 90 A 2d 652, 659:

> "It should be noted that the plaintiffs did not call Section 9 of the General Corporation Law to the Chancellor's attention, but argued solely that the presence of interested directors could not be ignored in determining whether the plan received a majority favorable vote at the Board's meeting. While the plaintiffs did not wage this precise reason for the illegality of the directors' act upon the Chancellor, they did, however, argue its illegality. We will not permit a litigant to raise in this court for the first time matters not argued below where to do so would be to raise an entirely new theory of his case, but when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation

> the argument should not be considered. We think the point falls within the class of additional reasons supporting the plaintiffs' theory. Cf. Stephenson v. Commonwealth & Southern Corporation, 19 Del. Ch. 447, 168 A. 211 and Great American Indemnity Co. v. State to the use of Mills, Del., 88 A.2d 426."

The fact is that, as clearly appears from the opinion of the Delaware Supreme Court, that court did pass upon Ezzes' contentions concerning the invalidity of the proxy solicitation.

As nearly as we can make out, the respondents appear to argue that the opinion of the Delaware Supreme Court cannot be relied upon to show that Ezzes raised the question of violation of the proxy solicitation provisions of the Securities Act in the State Court, because the opinion of the Delaware Supreme Court does not specifically state that the court is denying Ezzes' federal claim. There are two answers to this argument.

First, as we pointed out on pages 3 to 4 of our petition for certiorari, Delaware is one of the states which appears to take the position not only that it is not required to enforce Sec. 14(a) in a State Court matter, but that it is prevented from doing so by the "exclusive jurisdiction" phrase of Sec. 27 of the Securities Act. One of the reasons for granting certiorari in this case, is to determine whether the position of Delaware is correct.

Second, it is not necessary either that the federal claim shall have been made to the State Court in any

particular form of words and phrases, or that the ruling shall have been put in direct terms. The claim is to be regarded as having been adequately presented if the record as a whole shows either expressly or by clear intendment, that the claim was made, and the necessary effect of the judgment has been to deny the claim. *Bryant* v. *Zimmerman*, 278 US 63, 67, (1928). As was said in *Bryant*, at 278 US 63, 67:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

3

Regardless of any provisions of State Corporate Law, the Delaware Supreme Court was obligated to determine the matter by the application of the Federal Law

Respondents argue that this court should decline jurisdiction because the judgment of the Delaware Supreme Court can be sustained on independent grounds of State law. The argument of the respondents is that the judgment of the Delaware Supreme

Court can be sustained on the ground that the settlement was, as a matter of business judgment, fair and reasonable within the meaning of Delaware State law. This argument misconceives the matter which petitioner Ezzes asks this court to hear.

The fairness and reasonableness of the settlement has absolutely nothing to do with the federal question which Ezzes asks this court to hear. By the express terms of the 1956 Incentive Compensation Plan, it could not be changed without valid stockholder approval. Hence, valid stockholder action and approval of the 1963 Plan was necessary before it could become effective. Stockholder action and approval was sought by the directors by means of proxy solicitation. Both the Delaware Chancery Court and the Delaware Supreme Court found that the directors had information which "assured the directors that the 'new' plan (1963 Plan) would produce a substantially greater fund than would the old plan (1956 Plan), for 1963." But not one word of this information was set forth in the proxy material which solicited the stockholders' votes.

Ezzes claims that the failure to include this vital information in the proxy material was a violation of Sec. 14 of the Securities Act, and that this omission invalidated the stockholders' aproval of the 1963 Plan. As a consequence, federal law requires that the 1963 Plan be held invalid, apart from any consideration of the fairness or adequacy of the settlement. It is thus clear that the state law to which the respondents refer, has nothing to do with the case.

The argument of the respondents is succinctly answered by reference to those cases which hold that this

court will take jurisdiction of a case where a purported non-federal ground is unsubstantial and illusory, or inadequate to suport the state court judgment. *Lawrence* v. *State Tax,* 286 US 276, 282-283 (1932); *Williams* v. *Kaiser,* 323 US 471, 478 (1945).

The situation at bar is the kind of situation which this court referred to in its opinion in *JI Case* v. *Borak,* 377 US 426 (1964), when it said that "the overriding federal law applicable here would . . . control the appropriateness of redress despite the provisions of state corporation law . . ." because "if the law of the State happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of this section (Sec. 14) might be frustrated" (377 US 426, 434-435). Ezzes claims that the determination of the Delaware Supreme Court results in the very frustration which this court referred to in the above mentioned *Borak* case.

4

Respondents concede in effect that petitioner Ezzes is asking this court to hear a substantial federal question of nationwide importance

Respondents argue that the proxies were not false and misleading, despite the failure to include therein the vital information which the directors had to the effect that the 1963 Plan would produce substantially greater compensation for 1963 than would the 1956 Plan.

Respondents argue first, that there was no violation

of Sec. 14 of the Securities Act, because the information which Ezzes claims should have been set forth in the proxy material, had been previously disclosed in the Annual Report for 1962 which was sent to the stockholders one month prior to the proxy solicitation, and was largely a matter of public knowledge. The Delaware Supreme Court indicated that in its view, there would be no violation of Sec. 14 if the stockholders had the information in previous papers, or if it could be deemed a matter of public knowledge, even though it was not set forth in the proxy material. It held however, that the stockholders were not fully informed "with respect to the charge that the directors knew that the new Plan would produce substantially greater compensation for 1963 than would the old Plan" (Ezzes appendix, p. 24). Despite this holding, the Delaware Supreme Court declared the 1963 Plan valid, on the theory that the limited condition imposed by the Chancellor adequately took care of the objection that the proxy solicitation violated Sec. 14.

Ezzes contends that the record shows that the stockholders did not have any of the information in question, and that even if some of the information had been sent to the stockholders in previous communications, this would not excuse the directors from their obligation to set forth the information in the proxy material so that it could be considered by the stockholders in the context of the vote which was being solicited. It thus appears that there is an important question of whether directors can absolve themselves of their obligation under Sec. 14 of the Securities Act, to include vital information in the proxy ma-

terial, by the claim that the stockholders had or should have had the information in another manner.

Second, respondents contend that if they had included the information in the proxy material, they would have violated item 9 of Schedule 14A of Regulation 14, the Securities and Exchange Commission's note to Rule 14a-9 concerning predictions as to future earnings, and the decisions referred to on pages 17 to 18 of the Gallo brief concerning the inclusion of forecasts and projections of future earnings in proxy statements.

Ezzes contends that the information which should have been included in the proxy material, does not come within the proscription of the aforementioned schedule, commission note, or decisions. If however, the respondents are correct, this serves to emphasize the importance of the question which Ezzes asks this court to hear. If the argument of the respondents is correct, there is an important conflict which should be resolved by this court.

Conclusion

It is respectfully submitted that the Ezzes petition for certiorari should be granted.

Respectfully submitted.

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